

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF VIRGINIA
4 ALEXANDRIA DIVISION

4 UNITED STATES OF AMERICA,)
5 v.) Case No. 1:11-cr-116
6 THOMAS J. ERNST,) Alexandria, Virginia
7 Defendant.) December 16, 2011
8) 9:09 a.m.
9)

10 TRANSCRIPT OF SENTENCING
11 BEFORE THE HONORABLE CLAUDE M. HILTON
12 UNITED STATES DISTRICT JUDGE
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19 APPEARANCES:

20 For the United States: Thomas J. Krepp, Esq.
Charles Connolly, Esq.

21 For the Defendant: Peter L. Goldman, Esq.
22 Defendant Thomas J. Ernst,
23 in person

24 Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR

25 Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

P R O C E E D I N G S

THE CLERK: Criminal No. 2011-116, *United States of America v. Thomas J. Ernst*.

MR. KREPP: Good morning, Your Honor. Thomas Krepp and Charles Connolly for the United States.

THE COURT: Good morning.

MR. GOLDMAN: Good morning, Your Honor. Peter Goldman on behalf of Mr. Ernst who is present.

THE COURT: Good morning. Mr. Goldman, have you and your client had an opportunity to review this presentence report?

MR. GOLDMAN: Yes, Your Honor.

THE COURT: Any corrections you wish to make to it?

MR. GOLDMAN: None other than what we've already put in our papers, Your Honor, which I assume that the Court has reviewed.

THE COURT: Is there anything you want to say at this time?

MR. GOLDMAN: I do, Your Honor. There are a few points in this case I would, apart from the papers, like to touch upon very briefly. I know you have a full courtroom this morning.

First of all, Your Honor, let me sort of begin where typically I usually end in these cases. We would request, as far as incarceration, a minimum, a recommendation of a minimum-security facility such as Allenwood, perhaps, for

1 Mr. Ernst. I think that would be appropriate. Also, the
2 government has agreed to let him self-report, most likely
3 sometime in January or February of this year.

4 Your Honor, I'm going to raise an issue for the record.
5 I have a sense of how I think the Court will rule on it, but
6 over the last couple of weeks in my discussions with Ms. Lauder
7 and then yesterday in my discussions with Ms. Ernst, I've come
8 to the conclusion that there is an important mental health
9 aspect to this case that I didn't detect at first, but it's
10 really been over the course of the last several weeks as I've
11 been approaching the sentencing date.

12 Let me assure Your Honor this is not a delay tactic.
13 It's not designed for that. I would never do that with the
14 Court. If the Court is in agreement and thinks it's important
15 enough to get some kind of mental health evaluation of
16 Mr. Ernst, we would recommend a continuance of the sentencing if
17 the Court deemed it appropriate.

18 But as I stated in my papers, Your Honor, and I think
19 without committing Ms. Lauder to the request I just made because
20 she's not part of that, but I did have a discussion with her in
21 her office and we are in agreement that there is a mental health
22 component to this case. And if the Court wants to continue to
23 pursue that further, we would certainly not oppose it.

24 Your Honor, let me touch on a couple of points.

25 THE COURT: Well, now, it's not what I want to do.

1 It's what you want to do.

2 Are you representing to me that there's some problem in
3 this case and can support that?

4 MR. GOLDMAN: Your Honor, I would put it this way. I
5 believe that a mental health evaluation could assist the Court
6 with a greater understanding of all of the factors in this case
7 and as relates to Mr. Ernst, and it could add a -- that
8 information from that report could add material information to
9 the Court's determination as to a sentence.

10 THE COURT: So there's no question of him understanding
11 what he's doing and understanding where he is and right and
12 wrong and that sort of thing.

13 You just think that maybe some mental evaluation might
14 help me?

15 MR. GOLDMAN: I do, Your Honor. Again, all I can tell
16 you is I had the --

17 THE COURT: Would that be true in every case that comes
18 before me?

19 MR. GOLDMAN: No, I don't believe so, Your Honor.

20 I understand the point you're making, and it's a fair
21 one, sir, but I think in this case, as my dealings with
22 Mr. Ernst have gone on and on and after my discussion with
23 Ms. Lauder, I just -- there is a mental health component which
24 is why --

25 THE COURT: Well, I suppose there's something wrong

1 with people's thinking every time they go out to break the law,
2 particularly when they do it on a scheme over a period of time.
3 There is something wrong with that. It's hard to justify it.

4 But, you know, I'm troubled to come up here at the end,
5 we had a plea in this case, we've gone through the presentence
6 report, and now you're talking about a mental problem. That's a
7 little troubling.

8 MR. GOLDMAN: I understand, Your Honor. If the Court
9 wants to proceed with sentencing, I understand that. I
10 discussed it with my client yesterday, and I think we're in
11 agreement that we wanted to bring this before the record. I'm
12 not trying to complicate the record for you.

13 THE COURT: The trouble is you're not really telling me
14 anything. I mean, you've given me no reason to order such a
15 report but yet you're raising the issue. That's troubling.

16 MR. GOLDMAN: I did sort of -- I did describe it, Your
17 Honor, in my papers. I think that at times Mr. Ernst is not
18 rational. I think at times he has trouble accepting things. I
19 think there is a lack of common sense.

20 I'm not a psychiatrist, Your Honor, so I can't -- at a
21 certain point there's a limit as to my ability to describe the
22 situation to the Court and I think the Court's points about
23 everybody having some sort of problem that appears before this
24 Court in a criminal context having those issues. I put it
25 before the Court. If the Court wants to go forward with

1 sentencing today, I'm prepared to proceed.

2 THE COURT: What does the government have to say about
3 this?

4 MR. KREPP: Just so the Court is aware, this case was
5 indicted back in March. It's been continued. We did not object
6 to a continuance of the sentencing date. The plea date was
7 July 26th. The point of the continuance was so that Mr. Ernst
8 could get a forensic accountant. I don't believe a forensic
9 accountant has been hired to examine the tax records or the bank
10 records. I believe this is just another delay tactic.

11 THE COURT: I just can't -- I can't get in my mind what
12 purpose are we going to have him examined.

13 Is it his competency? Do you want me to send him to
14 Butner?

15 MR. GOLDMAN: Your Honor, I don't think it's a basic
16 competency issue. I just draw it to the Court's attention that
17 increasingly, as I have dealt with him, there is a mental health
18 component to the case that at first I didn't detect.

19 Given counsel's comments, we did in good faith, Your
20 Honor, seek an accountant to review records. The problem we
21 had, Your Honor, is, one, Mr. Ernst could not identify and
22 produce the underlying documents that allowed us to do that
23 analysis, and I eventually became aware that the Fourth Circuit,
24 that the controlling case law takes a very limited view of this
25 Court's ability to factor in potential deductions and exemptions

1 from the --

2 THE COURT: I'm not worried about that. I'm worried
3 about this -- maybe what we ought to do is just simply remand
4 him to custody, I'll send him to Butner, and we'll find out
5 whether he has a problem or not.

6 MR. GOLDMAN: Your Honor, I tell you what. Why don't
7 we withdraw it then and just go forward with the plea. At this
8 point I'll withdraw it with the plea. I think we should go
9 forward.

10 Can I talk to my client for a moment, Your Honor?

11 THE COURT: All right.

12 MR. GOLDMAN: He is, Your Honor. The reason we raise
13 this, Your Honor, he is under the care of a -- with the Veterans
14 Administration right now. He is on medication for depression.
15 I bring this to the attention of the Court, Your Honor, not to
16 complicate the record and certainly not to antagonize the Court,
17 but I have an -- in the zealous --

18 THE COURT: You're not antagonizing the Court, but
19 you're making a motion and without any grounds for it and
20 something that goes to the heart of the plea and the heart of
21 the case, and it's troubling to have it raised in this way.

22 Now, if he's under the care of a psychiatrist --
23 there's a lot of people under the care of a psychiatrist.
24 There's innumerable people in this country that have depression.
25 That's one thing.

1 You're asking for some kind of a mental examination.
2 And really, once it's raised, I probably ought to do it.

3 MR. GOLDMAN: Your Honor, I'll tell what. I will
4 withdraw the request and let's move forward with the plea.

5 THE COURT: Is that what your client wants to do?

6 MR. GOLDMAN: Yes, Your Honor.

7 THE COURT: All right.

8 MR. GOLDMAN: If I can touch on some other issues then
9 in the plea.

10 THE COURT: You go ahead.

11 MR. GOLDMAN: First of all, there is some talk in the
12 presentence report and the government has responded with great
13 alarm about Colorado mines and the potential purchase of new
14 healthcare businesses.

15 This sort of relates back a little bit to the mental
16 health issue. Your Honor, Mr. Ernst may say -- and, frankly,
17 whether this Colorado mine investment exists or doesn't exist, I
18 don't know, Judge Hilton. I don't think, for our purposes
19 today, I don't think it's that important.

20 What I do know is this. Mr. Ernst is going to go
21 through some period of incarceration, I believe, and then he
22 will be on supervised release. By the time he comes out, Your
23 Honor, in his early seventies, with the record of these criminal
24 convictions, with these felony convictions at his age and his
25 physical condition, Your Honor, he's not going to be buying any

1 new businesses. He's not going to be -- his business and
2 professional career is over.

3 To the extent that there may be some mine investments
4 out there, Judge Hilton, he's going to be under supervised
5 release. The government is going to swoop in and have a
6 constant review of any assets he has, and those assets are
7 plainly going to be seized for purposes of paying the tax
8 restitution.

9 I find that the government has completely overreacted
10 to this. And strangely enough, they almost start to sound as
11 kind of wild-eyed as Mr. Ernst. I think it's just a lot of --
12 Mr. Ernst has a tendency to puff. I think it's a lot of talk.
13 I certainly don't give it any weight, and I would recommend to
14 the Court not to give it any weight.

15 I have told Mr. Ernst from the beginning of the case
16 and he is aware of the kind of scrutiny that he will be involved
17 in in his continuing connection with the criminal justice
18 system. I think his post-incarceration life, Judge Hilton, will
19 look something much more like this.

20 He's going to live in a one-bedroom apartment with a
21 disabled wife. He will get some sort of very, perhaps, small
22 job as -- I don't know -- as a cashier or in a retail place,
23 something like that, earn a *de minimis* amount of money. He's
24 going to be using public transportation. He's never going to
25 own a home again. He's never going to own a car again. His

1 financial life and professional life is over. I think
2 everybody, including the government, should calm down about that
3 and stop reacting to every musing he may have had with
4 Ms. Lauder in the probation office.

5 I want to address, Your Honor, the government's
6 recommendation of 75 months because it comes late -- speaking of
7 late, Your Honor -- it comes late in this case. In the
8 government's reply late yesterday afternoon, they pointed out
9 that they never made a commitment to a time they would recommend
10 in the plea papers, which is true, and of course in my papers I
11 never said that.

12 What I referred to is that from the beginning of my
13 representation, what they consistently talked to me about is
14 requesting 51 months. Are they free to come in here and ask for
15 75 months? Yes, but I will tell you, Your Honor, a week
16 before -- a week or so before a plea after a case has lasted
17 this long to have this sort of request for the upward variance
18 does come as more than a bit of a surprise. More substantively,
19 Your Honor, I don't think there's any justification in the
20 record for it under the law and the facts.

21 The government claims -- there is a certain sense of
22 alarm that the government counsel has approached this case.
23 Plainly, Your Honor, Mr. Ernst's conduct was reprehensible and
24 there are aspects of the case which are obnoxious and offensive.
25 There's no question. Having said that, when the government in

1 its papers talks about the case being unique, I respectfully
2 disagree with that, Your Honor. This is a man who didn't file
3 returns and pay his taxes and lived large and spent money
4 improperly. We know that. But that's not unique to tax cases.
5 That happens all the time. So let's distinguish between, you
6 know, what's unlawful, reprehensible, and obnoxious as opposed
7 to unique. I don't think that there are unique factors here in
8 any way justifying a sentence up to -- the upward variance up to
9 75 months.

10 Your Honor, I would ask the Court to consider two other
11 factors. That is, first, Your Honor, as I put in my papers,
12 when you're fashioning a sentence, and what I think this hearing
13 really is about today is the time that the Court's going to give
14 Mr. Ernst, consider the tremendous hit he's already taken in his
15 life as a result of this. I list those factors in my papers.
16 It's affected his health, his wife's health. It strained the
17 relations with his sons. He's filed for bankruptcy. He's lost
18 all of his assets. There are just a myriad of factors.

19 Plainly, Your Honor, Tom Ernst is responsible for all
20 of these. He doesn't come to this Court today to lay off the
21 blame on anyone other than himself, but in fashioning a
22 sentence, Your Honor, you're dealing with a 67-year-old man with
23 some health issues who's, apart from the time of incarceration,
24 Judge Hilton, is taking a tremendous hit. As I've already
25 described to you, Judge Hilton, when he is released and put on

1 supervised release, he's going to have -- his life is going to
2 be much smaller than it was and it will be that way to his last
3 days.

4 The other factors I ask the Court to consider with, I
5 think, with a degree of dispassion and objectivity, which
6 obviously the government is not bringing, is the fact that Tom
7 Ernst has done some good things in his life. He served this
8 country honorably in the United States Air Force during the
9 Vietnam Era when military service was not considered to be so
10 popular.

11 He worked as a young man in the civil rights movement
12 for the SCLC in Alabama. He did compile an excellent academic
13 record and was an outstanding student. He, at one point, Your
14 Honor, was a staffer for Congress. He served his country and
15 has done some things good. Plainly, Judge Hilton, he lost his
16 way. Plainly, the conduct we're here about today is simply
17 unacceptable, reprehensible, and has to be punished.

18 At the end of the day, the Court has to decide upon an
19 amount of time of incarceration. We're going to leave -- I'm
20 going to leave it to the Court. The government has asked for
21 75 months, which, frankly, I submit to you is unsupported by the
22 record and is over the top. The guideline, the minimum
23 guideline, Your Honor, is 51 months.

24 I would respectfully submit, given the fact that he has
25 *de minimis* prior contact with the criminal justice system, at

1 his age and his condition and what his post-release life will
2 look like, which is it's going to be very small, Your Honor.
3 Your Honor, I've talked about 15 months in my papers. I think
4 something in the 15, 30 -- I think once we get past the 15-,
5 25-, 30-month period of incarceration, what I would ask you,
6 Judge Hilton, is what's being accomplished? Keeping this man in
7 jail for 4, 5, 6, or 75 months, at a certain point, when does it
8 become piling on? When does it become punitive? When is, sort
9 of, when is -- there's nothing remedial, constructive, or under
10 3553, under the 3553 factors, when is there something simply not
11 being accomplished?

12 I would respectfully submit, Your Honor, that if the
13 Court were to fashion a sentence -- I don't know -- of 20, 25,
14 30 months, after that, Judge Hilton, I don't really know what's
15 being accomplished, but we'll leave it to your wisdom and your
16 guidance in this.

17 With that, Your Honor, those are my remarks. Thank
18 you.

19 MR. KREPP: Your Honor, the government does not take
20 lightly its decision to seek an upward variant sentence. We
21 believe the 3553(a) factors fully support the government's
22 recommendation of 75 months of incarceration.

23 First, Your Honor, this was a very serious offense.
24 I'm not going to detail everything the government laid out in
25 its position paper, but I'm sure the Court is well aware this

1 was a serious offense that took place over a great period of
2 time. The defendant stole almost \$4.5 million from the United
3 States government. He did this by representing himself to be
4 somebody who could help the Postmasters, League of National
5 Postmasters run their benefits plan. He did this by putting
6 forward a false \$10 million bond.

7 Your Honor, what distinguishes this case from other tax
8 cases is the extent to which the defendant went to avoid paying
9 his taxes. He used nominee accounts. He put money in the name
10 of family members. He took mortgages out in his sons' names
11 without telling them.

12 Your Honor, because of this it's had a direct impact,
13 not just on the U.S. Treasury, it impacted the National League
14 of Postmasters and it also impacted his own family members. The
15 community must be protected, Your Honor. The reason that the
16 mining contracts are important, it's not that the defendant was
17 musing with his probation officer. There were documents upon
18 documents submitted to probation indicating that he had upwards
19 of \$800 million in mining contracts right now. It shows the
20 defendant will continue to submit false documents to whoever he
21 can.

22 Your Honor, as in any tax case, general deterrence is a
23 key consideration. This is especially true in this case. The
24 defendant went to such extreme lengths to avoid paying his
25 taxes. He went to such extreme lengths to obstruct the services

1 of the IRS. Because of that, an upward variant sentence is
2 appropriate. It's sufficient but not more than necessary to
3 deter the defendant and deter others from committing future acts
4 like this.

5 Your Honor, unless the Court has any questions, I would
6 rest on our paper.

7 THE COURT: Mr. Ernst, would you come to the podium.
8 Is there anything you want to say at this time?

9 THE DEFENDANT: Yes, Your Honor. Thank you.

10 I want to apologize to the Court and say how extremely
11 sorry I am. I just want to balance the good things versus the
12 obvious bad things.

13 First, I embarrassed my family. My father was an
14 assistant U.S. attorney. He died when I was four of a heart
15 attack. He's started at legal aid. He had a great reputation
16 as a good and honest lawyer.

17 Your Honor, I tried to follow his example. I started
18 with civil rights work in Alabama when it was both dangerous and
19 unpopular. I lived on Dynamite Hill, so named because all of
20 the houses were blown up of lawyers and doctors in Birmingham.
21 And then, Your Honor, I worked in public health in TB control.
22 I would go into houses where there were active tuberculosis
23 cases and work with them trying to help them.

24 Your Honor, when I was in college, I was very active in
25 many different things. I was named student of the year and then

1 I gained my master's degree in international relations at the
2 height of the Vietnam War. I won fellowships to different
3 colleges, graduate school, so I had the option of going to
4 graduate school but turned it down.

5 I volunteered and enlisted and was recruited from
6 campus by CIA. And they, as you know, have a very rigorous
7 training program, and I did all of that and went to The Farm and
8 learned about all of that. I continued to work with the
9 intelligence services in the Air Force for a number of years.
10 Altogether, Your Honor, had over 22 years of public service, 5
11 years in Congress working on health matters. So I've done a lot
12 of good things along the way. I've taught a number of courses
13 in college. Probably the most educated defendant but the
14 dumbest guy to come before you.

15 I wanted to just balance the good versus the obvious
16 mistake. Thank you, Your Honor.

17 THE COURT: Mr. Ernst, I find the guideline factors in
18 this case to be properly assessed at a range of 51 to 63 months,
19 but because of your financial condition, the imposition of any
20 fine or cost is not warranted.

21 Considering the factors that I must consider under
22 Section 3553, I find that a sentence near the low end of the
23 guideline range would be an appropriate one.

24 It will be the sentence of the Court, as to Count 1,
25 you be committed to the custody of the Attorney General to serve

1 a term of 36 months, a 1-year period of supervised release, and
2 pay a special assessment fine of a hundred dollars.

3 As to Count 2, that you be committed to the custody of
4 the Attorney General to serve a term of 12 months, a 3-year
5 period of supervised release, and pay a special assessment fine
6 of a hundred dollars.

7 There are a couple of conditions of your supervised
8 release. One is that you undergo any mental health counselling
9 or monitoring that may be required by your probation officer;
10 and, second, that you provide any financial information that
11 your probation officer may request.

12 The supervised release terms in these two counts will
13 run concurrently with one another. I will allow you to
14 voluntarily surrender yourself when space is available and will
15 recommend a minimum-security facility.

16 MR. GOLDMAN: May I ask one question?

17 The sentences in Count 1 and 2, are they consecutive or
18 concurrent?

19 THE COURT: Only the supervised release periods are
20 concurrent.

21 MR. GOLDMAN: Thank you, Your Honor.

22 MR. KREPP: Your Honor, we also have a restitution
23 judgment to be entered.

24 THE COURT: If you'll hand that up to me, I'll enter
25 it.

1 MR. GOLDMAN: My client signed it, Your Honor.

2 THE CLERK: Criminal No. 2008-331, *United States of*
3 *America v. --*

4 THE COURT: Excuse me a minute. There's no amount in
5 this order. Nobody's signed it. Did you-all hand me the right
6 thing?

7 I'm sorry. It is signed, but there is no amount.

8 MR. KREPP: I apologize, Your Honor. The plea
9 agreement states that the Court will determine an amount
10 appropriate.

11 THE COURT: Well, wait a minute.

12 MR. KREPP: We originally believed, with the hiring of
13 the forensic accountant, that we would be contesting the loss
14 amount of the sentencing, but there was -- it wasn't a contested
15 sentencing.

16 The government's position would be that the full loss
17 amount stated in the PSR, slightly under \$4.5 million, is the
18 appropriate amount of restitution.

19 THE COURT: Do you agree with that, Mr. Goldman?

20 MR. GOLDMAN: That's fine, Your Honor.

21 THE COURT: What's the sum?

22 MR. KREPP: Your Honor, I have the sum right here.
23 It's \$4,490,966.08.

24 THE COURT: Okay.

25 MR. GOLDMAN: That's correct, Your Honor. Thank you.

* * *

(Proceedings concluded at 9:33 a.m.)

CERTIFICATION

I certify, this 21st day of December 2011, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

/s/

Tracy Westfall, RPR, CMRS, CCR